Contact
Prof. Reinout Vriesendorp
Leiden Law School
PO Box 9520
2300 RA Leiden
The Netherlands
E: info@ceril.eu
W: www.ceril.eu

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Re: CERIL Statement 2023-3

Reporters: Prof. Paula Moffatt and Prof. Dominik Skauradszun[1]

CERIL Statement 2023-3 on

Crypto-assets in Restructuring and Insolvency

CERIL finds that, as a result of the complexity of the crypto-market and its rapid evolution, there is a lack of clarity as to whether insolvent crypto-asset service providers, in particular crypto custodians, should be governed by the European Insolvency Regulation Recast (EIR), the EU Single Resolution Mechanism or the EU Winding-up Directive. CERIL's view is that the EIR's exclusion in Article 1(2) should be interpreted

[1] This Report is prepared by CERIL Working Party (WP) 16 on Crypto Assets. The WP that discussed and contributed to this Report consisted, in addition to Reporters, of the conferees participating in this WP, see https://www.ceril.eu/working-parties/wp-16-crypto-assets.

The reporters would like to express their gratitude for their extensive contributions to Jenny Davidson (United Kingdom), Dr. Jennifer Gant (United Kingdom), Rita Gismondi (Italy), Prof. Elina Moustaira (Greece), Justice Catarina Serra (Portugal), and two observers, Tina Balzli (CMS von Erlach Partners Ltd, Switzerland) and Prof. Tycho de Graaf (Professor of Technology and Private Law, Leiden University, the Netherlands), as well as Research Associate WP 3 (Enterprise Groups) Ilya Kokorin (Leiden University, the Netherlands). In addition, they would like to thank Prof. Stephan Madaus (Germany) and Oleksandr Biryukov (Ukraine) for their comments on an earlier draft.

We would also like to express our sincere gratitude to Research Associate Ivi Karra, POTAMITISVEKRIS, for the preparation of a preliminary study and the assistance with drafting the text of this report.

narrowly, so that crypto-asset service providers such as pure crypto custodians fall within its scope, but recommends that, in light of the introduction of the Markets in Crypto-assets Regulation (MiCAR), the European regulator should cautiously undertake a proper assessment of the most appropriate approach. CERIL further recommends that the EIR should be amended for crypto-assets in three ways: first, to include an autonomous definition of "crypto-asset"; second, to make it explicit that the lex libri siti applies only to those blockchains subject to the supervision of a public authority; and third, to provide a waterfall mechanism for determining where crypto-assets are situated.

Background

CERIL studied some of the specific legal and practical issues that arise in insolvency proceedings involving crypto-assets, and considered whether the EIR should be amended to address them. The study was largely doctrinal and considered relevant legislation, case law and literature from the EU and third countries, including the EU *Markets in Crypto-assets Regulation,* the UNIDROIT *Principles on Digital Assets and Private Law* and the UK Law Commission's *Digital assets: Final report*.

The crypto-asset market raises many complex issues. Difficult questions include determining whether crypto-assets are capable of being subject to a proprietary interest and whether, if it is assumed that they are, this assumption is legally accepted in all jurisdictions. Similarly complicated is the question of where crypto-assets are 'situated', bearing in mind that they consist of a distributed ledger and often shared amongst computer network participants spread around the world.

A particular conundrum arises in the context of crypto custodians holding crypto-assets for their true owners. To the untrained eye, crypto custodians look very similar to banks or financial services companies managing investment portfolios. The EIR is explicit that 'credit institutions' or 'investment firms' are excluded from the scope of the EIR; instead they fall under the EU Single Resolution Mechanism and the Winding-up Directive. While many crypto custodians will not fall within either of these definitions, some may do so. But if they do, is the Single Resolution Mechanism the best solution for managing their insolvency, or is it better for them to fall within the scope of the EIR?

The scope of the enquiry

In view of this complexity, CERIL recognised the importance of limiting its enquiry and identified six specific questions for the study, summarised below:

1. Should the EIR include a definition of crypto-asset?

2. Whether the scope of the EIR was all-encompassing and whether there was a regulatory gap?
3. Whether the EIR should define where crypto-assets should be allocated?
4. Whether the EIR conflict of law rules cover crypto-assets registered in crypto-asset registers?
5. Whether EU Member States set comparable requirements in determining whether crypto-assets form part of the insolvency estate?
6. Whether the EIR should include a power for insolvency practitioners to realise crypto-assets of the insolvency estate, irrespective of national law?

These questions focused on the areas where insolvency practitioners dealing with insolvency proceedings involving crypto-assets might be likely to encounter uncertainty. Uncertainty in the management of an insolvency estate is undesirable as it is likely to increase the overall costs of the insolvency proceedings while it is resolved, ultimately reducing returns to creditors. The study therefore considered whether any of the uncertainties identified could be resolved by amendments to the EIR.

Conclusions and recommendations:

CERIL makes several recommendations to improve certainty on treatment of crypto assets in restructuring and insolvency, including:

1. That the EIR should be amended to include an autonomous definition of crypto-asset;
2. That the (i) EIR's exclusion in Article 1(2) should be interpreted narrowly to ensure that crypto custodians are not excluded from the EIR; and (ii) for the European legislator cautiously to undertake a proper assessment as to whether the EU Single Resolution Mechanism or the Winding-up Directive (or an alternative regime) would be more appropriate for insolvent crypto custodians than the EIR;
3. That the EIR should be amended to provide a waterfall mechanism for determining where crypto-assets are situated;
4. That the EIR should be amended to apply the *lex libri siti* only to those public blockchains supervised by a public authority;
5. That because crypto-assets are recognised as being transferable and realisable as a matter of EU law, they form part of the insolvency estate in all Member States and no amendments to the EIR are required; and
6. That there is no immediate need to introduce specific enforcement powers for insolvency practitioners or regulate them in a cross-border context in respect of crypto-assets, although this should be reviewed at a later stage.

Concluding Note

The full Report is available as Report 2023-3 on CERIL's website www.ceril.eu. This site also informs about the organisation of CERIL and its activities.

In the meantime, co-reporters Prof. Moffatt (paula.moffatt@ntu.ac.uk) and Prof. Skauradszun (dominik.skauradszun@w.hs-fulda.de) welcome the opportunity to further inform about this Statement and Report.

For further information regarding CERIL, please contact Prof. Reinout Vriesendorp (Secretary; info@ceril.eu).

On behalf of the CERIL Executive,

Bob Wessels
Chair